IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16781 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHAMPABEN ALIAS MANDAKINI W/O. RAMABHAI MALI

Versus

COMMISSIONER OF POLICE VADODARA

Appearance:

1. Special Civil Application No. 16781 of 2003

MR SATISH R PATEL for Petitioner No. 1

Ms Mita Panchal, AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 21/04/2004

ORAL JUDGEMENT

The petitioner has filed this petition under under Article 226 of the Constitution of India for

appropriate writ, order or direction for quashing and setting aside an order dated 17.11.2003 passed by respondent No.1 under section 3(2) of the Gujarat Prevention of Anti-social Activities At, 1985 (for short, 'the PASA Act') directing detention of the present petitioner on the grounds stated in the detention order.

2. It was alleged against the petitioner that four FIRs were filed against the petitioner before Northern police station C.R. Nos. 23/02, 1677/02, 1166/03 and 1318 of 2003 relating to offences punishable under sections 65, 66 and 81 of the Bombay Prohibition Act, 1949. It was also alleged against the petitioner that two witnesses have rendered statements against the detenu and their names were not disclosed. On the strength of the aforesaid registered offences and unregistered cases, the detenu was found to be a bootlegger and with a view to prevent him from carrying on his bootlegging activities, he was ordered to be detained by an order of detention impugned in this petition.

3. The petitioner has challenged the said order of detention on several grounds. It has been contended that simply because few prohibition offences have been registered against the petitioner, it cannot be said that the petitioner was a bootlegger and his activities amounted to a threat to public order or public health. That since the names of the witnesses have not been disclosed, the petitioner could not effectively defend his case and could not effectively sent representation guaranteed under Article 22 (5) of the Constitution of India. That therefore, the order of detention is illegal and deserves to be quashed and set aside.

4. On receiving the petition, rule was issued and in response to the notice of rule, Ms. Mita Panchal, learned AGP appears on behalf of the respondents. I have heard the learned Advocates for the parties and perused the papers.

5. It is not much in dispute that the petitioner was detained on account of registration of three prohibition cases. On going through the said FIRs, it would be difficult to hold that these activities of the petitioner would lead to a threat to public order or public health. It may be a matter relating to a threat to law and order situation but simply because when law and order situation is in danger, it cannot be said that in such cases, there would be a further threat to public order or public health. Therefore, on account of the registration of the aforesaid offences and considering the muddamal articles

seized from the petitioner, it would be difficult to hold that the petitioner was a bootlegger and his activities amounted to a threat to public order or public health.

6. The detaining authority has considered statements of two witnesses and their names have not been disclosed. It is well settled that when the statements of witnesses are considered by the detaining authority, names of the witnesses would be required to be communicated to the petitioner with a view to observe principles of natural justice and with a view to enable the petitioner to submit effective representation against his detention. In the present case, the detaining authority has claimed power of privilege under section 9(2) of the Act. However, it is also well settled that while claiming privilege under section 9(2) of the Act, the detaining authority is required to have credible materials with it and an enquiry is required to be made by them with respect to the genuineness and correctness of the statements made by the witnesses with respect to the fear and apprehension expressed by them. There appears to be no material with the detaining authority to show that such a fear or apprehension was found through enquiry. In absence of credible material with respect to the enquiry made by the detaining authority with respect to the existence of fear or apprehension, it would be difficult to hold that the power of privilege under section 9(2) of the Act was properly claimed. If the statements of the witnesses have not been disclosed to the petitioner and the power of privilege has not been properly exercised then in that event, non-disclosure of the names would be fatal to the detention order. On this point, it was fortified by a decision dated 19.4.2000 in Special Civil Application No.294/2000 wherein it was held that before considering the statements of unnamed witnesses, the detaining authority is required to verify the genuineness and correctness of the statements made by the witnesses with respect to the feat expressed by them. Since the names have not been disclosed, the petitioner is deprived of his right to effectively represent his defence guaranteed under Article 22(5) of the Constitution of India.

7. In view of the above position, on the one hand, registration of the offence against the petitioner does not appear to be leading to a threat to public order or public health, on the other hand, non-disclosure of names of the witnesses has become fatal to the detention order. Consequently, the order of detention cannot be sustained in the eye of law. Hence it is required to be quashed and set aside.

8. For the foregoing reasons, this petition is allowed. The impugned order dated 17.11.2003 passed by respondent No.1 is ordered to be quashed and set aside. The detenu is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute to the aforesaid extent. No order as to costs. D.S. permitted.

[D P Buch, J.]

msp